INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	2
Argument	6
Conclusion	8

CITATIONS

Cases:

Gearhart v. *United States*, 272 F. 2d 499	7
Kadwell v. *United States*, 315 F. 2d 667	6
Poole v. *United States* 250 F. 2d 396	6

Rule:

F. R. Crim. P., Rule 32(d)	2

726-519—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 886

PAUL M. HUGHES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11–16) is reported at 325 F. 2d 789. The opinion of the district court (Pet. App. 17–38) is reported at 223 F. Supp. 477.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1964 (Pet. App. 40). A petition for rehearing was denied on January 31, 1964. The petition for a writ of certiorari was filed on March 2, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court abused its discretion in denying a motion to withdraw a plea of guilty.

2. Whether the trial judge should have disqualified himself from ruling on the motion to withdraw a guilty plea upon being told that he might be called to testify when in fact he did not become a material witness.

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may be set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner was charged in a thirty-two count indictment returned on November 18, 1960, in the United States District Court for the Southern District of New York with offenses arising under the mail fraud and security fraud statutes (P.A. 128–146).[1] On December 12, 1960, petitioner pleaded not guilty (P.A. 2).

On April 3, 1961, petitioner appeared before the district court with retained counsel to enter a guilty plea to count 32, the conspiracy count. Before accepting

[1] The record on file with the clerk consists of the appendices to the briefs filed in the court of appeals. Petitioner's appendix is designated herein as "P.A." and the government's as "G.A."

the plea, the judge asked petitioner if he had discussed the facts alleged in count 32, and the possible defenses to the charges, with his attorney. He specifically asked petitioner if he knew that he was subject to the same punishment as if he had stood trial and were convicted by a jury. Petitioner said that he had not been promised or offered anything to induce him to change his plea and that the guilty plea was being made as an act of free will. The court then ordered the probation officer to prepare a presentence report and continued the case until May 8, 1961 (G.A. 127–129; P.A. 2). The case was not called for sentencing until February 1963 and then, at petitioner's request, was adjourned to April 1963. After the case was assigned to Judge Herlands for sentencing (P.A. 23–25), petitioner moved to withdraw his guilty plea on the ground that he was led to believe that if he cooperated with the government, it would conduct itself so "as to make likely a more lenient sentence" and would permit him to adjourn the sentencing so that he could bypass judges who might treat him "more severely" than other judges (P.A. 7–10). Upon this motion, the court held six days of hearings (P.A. 5), and thereafter denied his request for relief. On June 21, 1963 petitioner was sentenced to imprisonment for eighteen months (P.A. 125–126).

At the hearing it was shown that, before petitioner's plea of guilty, his retained counsel, Thomas A. Bolan, asked Assistant United States Attorney Jerome J. Londin if the government desired petitioner's cooperation in any governmental investigation. Londin replied he was interested in a group known as Garfield-

Pasternak or United Dye, and Bolan said that petitioner would cooperate. At a second meeting, the government refused Bolan's request that the government file a nolle prosequi with respect to petitioner. In the conversation, Bolan said that petitioner would plead guilty. He then inquired about possible adjournment of the sentencing. The Assistant United States Attorney responded that he should apply for an adjournment in Room 318, the courtroom where the calendar judge sat, that the government would not object to an adjournment of one month if he offered a plausible reason, nor would it oppose a second adjournment (G.A. 4–7, 24–26). Bolan asked whether petitioner would be indicted in any other case. The Assistant replied that, based upon petitioner's cooperation, the Assistant would act in the government's best interest and that petitioner must rely on the Assistant's integrity (G.A. 11–12). The Assistant told Bolan, that, at the time of sentencing, petitioner's cooperation would be called to the attention of the sentencing judge; that while the government would not recommend for or against a jail sentence, if petitioner cooperated fully the government would not press for a jail sentence but that the sentence would be at the discretion of the court (G.A. 12–13).

In June 1961, Assistant United States Attorney Walpin took over the investigation of the United Dye case (*United States* v. *Garfield, et al.*). In June 1962, in the course of preparing against anticipated cross-examination of petitioner in the trial of that case, petitioner reaffirmed his guilt in the present case to Walpin (G.A. 99–100). On February 6, 1963, the

jury verdict was returned in the *Garfield* case (P.A. 90). In the middle of February, Walpin notified Bolan, petitioner's attorney, that the government planned to put petitioner's case on the calendar for sentencing (G.A. 100–101). Bolan informed Walpin that he had been promised adjournments for a month at a time in order to pick the sentencing Judge (G.A. 101). Walpin, who had not handled the case initially, checked and found no such commitment had been made (G.A. 101–104). On February 26, 1963, the judge in charge of the court's calendar assigned the case to Judge Herlands for sentencing on the government's application (P.A. 23–25), because it was part of a series of interrelated indictments (G.A. 2). Walpin had previously ascertained that Judge Herlands was agreeable to its referral (P.A. 90, 100). The judge made a statement to such effect for the record (P.A. 89–90).

On June 21, 1963, when petitioner's case was called for sentencing, the United States Attorney told the court that petitioner's cooperation in *United States* v. *Garfield* was "less than a hundred per cent" and that petitioner was not cooperating in a case then being investigated by the United States Attorney's office (P.A. 101). In sentencing petitioner, the judge said "he is being given full and complete credit, in my judgment, for the cooperation he gave in the case of United States v. Garfield, et al." and noted that he was disregarding the government's claim of lack of cooperation in its pending investigation (G.A. 121–122).

ARGUMENT

1. Petitioner, represented by counsel of his choice, voluntarily and with a full understanding of the consequences, withdrew a previous plea of not guilty and pleaded guilty. This plea was not taken in haste but was entered over three and a half months after the initial arraignment. Petitioner reaffirmed his guilt when he was interviewed in connection with a related case in which he testified. Not until after his own case was set for sentencing, two years after the plea, was there any assertion of innocence on petitioner's part in the motion for withdrawal of the guilty plea, and, even then, no facts were set forth to support the claim.

Under the circumstances, the mere assertion of innocence, so long after the plea, in the context of all the facts that were developed at the hearing, did not require the granting of the motion to withdraw the plea. The record as a whole justified the conclusion that the claim of innocence was belatedly made, not as a *bona fide* assertion of innocence, but because petitioner was fearful a sentence more severe than he had hoped for might be imposed. While a motion to withdraw a plea of guilty will be allowed more freely before sentence than after, there must be more of a showing than was made here to justify setting aside the plea.[2]

---

[2] None of the cases cited by petitioner conflict with the ruling below. In *Kadwell* v. *United States*, 315 F. 2d 667 (C.A. 9), the guilty plea was set aside because of the brevity of the defendant's consultation with his court-appointed attorney. In *Poole* v. *United States*, 250 F. 2d 396 (C.A.D.C.), the defendant

2. In the district court, petitioner attempted to show that his attorney had made an agreement with the Assistant United States Attorney which would enable him to choose a lenient judge for sentencing by the device of adjourning his sentence in the calendar courtroom until such time as a favorable district judge was sitting. It was his position, further, that the United States Attorney broke this agreement by causing the assignment of the case to Judge Herlands. The United States denied the existence of such an agreement. Prior to the hearing, petitioner's counsel informed Judge Herlands that he might be called to testify (P.A. 29–30), and, later, counsel said that he thought the judge would be disqualified if he should become a material witness (P.A. 35). Subsequently, at petitioner's request, Judge Herlands declared that he had agreed that the sentencing be referred to him because of his familiarity with the United Dye case (P.A. 89–90).

It is plain the judge was not a material witness. Judge Herlands could have had no part in the events which petitioner set forth as the basis of his motion to withdraw the guilty plea. As the court below found, the information which the judge possessed, and which he stated on the record, was not relevant to the issues at the hearing.

---

did not have the assistance of counsel. And in *Gearhart* v. *United States*, 272 F. 2d 499 (C.A.D.C.), the plea was set aside because evidence of psychiatric disorders substantiated the defendant's claim that he was mentally incompetent at the time the crime was committed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

APRIL 1964.